SUPREME COURT, U. S.

Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1961

No. 683

RAUL PINTO,
Petitioner,
AGAINST
STATES MARINE CORPORATION OF DELAWARE,
Respondent.

GEORGE HOOPER,
Petitioner,
AGAINST
TERMINAL STEAMSHIP COMPANY,
Respondent.

GEORGE EZEKIEL,
Petitioner,
AGAINST
VOLUSIA STEAMSHIP CO., and SUWANEE STEAMSHIP CO.,
Respondents.

GEORGE RICHTER,
Petitioner,
AGAINST
MATHIASEN'S TANKER INDUSTRIES, INC., and S.S. MICHAEL J. her engines, hull, tackle, cargo and her appurtenances thereof.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT, MATHIASEN TANKER INDUSTRIES, INC. BRIEF IN OPPOSITION TO CERTIORARI

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Mathiasen's Tanker Industries, Inc.

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IN THE

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OCTOBER TERM, 1961

No.

RAUL PINTO,

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AGAINST

STATES MARINE CORPORATION OF DELAWARE,

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GEORGE HOOPER,

Petitioner

AGAINST

TEXMICH STEAMSHIP COMPANY,

Respondent

GEORGE EZEKIEL,

Petitioner

AGAINST

VOLLMER STEAMSHIP CO. and SEAWAY STEAMSHIP CO.,

Respondents

GEORGE RUSSELL,

Petitioner

AGAINST

MATHIASEN TANKER INDUSTRIES, INC. and SS MICHAEL J. her engines, etc., tackle, cargo and her appurtenances thereof,

Respondents

RESPONDENT, MATHIASEN TANKER INDUSTRIES, INC. BRIEF IN OPPOSITION TO CERTIORARI

Petitioner George Richter while employed as a Second Assistant Engineer aboard the Tanker Michael J sustained an injury to his right ankle when he fell from a metal shelf which was about a foot above the deck and on which petitioner was standing with both feet and making an inventory of some spare parts which were stored on an upper shelf in a small store-room aboard the vessel.

On the trial, as pointed out by the Court of Appeals in its opinion (p. 60 of Petition) and contrary to petitioner's misstatement in the petition (p. 6) of Petition) there was no claim nor proof that petitioner's fall was caused by a slippery shelf. The only reason which petitioner could offer for his fall was that, although the vessel was then proceeding in ballast in inland waters and the sea was calm he may have lost his balance due to a roll of the vessel or a change of course by the vessel. There was no claim that the shelf on which petitioner was standing did not at the time furnish a firm foothold or that the position which petitioner voluntarily assumed was in any way dangerous or precarious. In fact, petitioner testified that based upon his experience of some thirty (30) years aboard ships the way in which he was conducting the inventory was not only the customary manner but also the only way in which it could be carried out with safety.

The sole basis which petitioner offered in support of his claim for damages was the bare contention that since no ladder was available the Trial Court was compelled to find the vessel unseaworthy even though on petitioner's own testimony it was established that a ladder would not have been feasible under the circumstances for the work petitioner was doing.

The Trial Court refused to follow this erroneous concept, and found as follows:

> "11. The libelant has failed to prove by a fair preponderance of the credible evidence that the failure to provide the libelant with a ladder rendered the S.S. MICHAEL unseaworthy since by his own testimony, the use of a ladder in the small store room was not feasible and in the Court's opinion the use of an unattached ladder would be highly dangerous."

On appeal to the Court of Appeals, petitioner stated that he did not challenge the Trial Court's findings of fact and conceded that they were correct in all respects. Petitioner, however, urged that the Trial Court's finding based on the evidence that the alleged non-availability of a ladder did not render the vessel unseaworthy was in error as a matter of law and that it was in conflict with this Court's decision in *Mitchell v. Trawler Racer*, 362 U. S. 539 and assorted other lower Court cases. Petitioner now was contending that having established an accident and shown that the work could have been done in a different manner, the vessel should have been found unseaworthy though it concededly would have been highly dangerous to do it in such a manner. No negligence concept of notice either entered into or was material on the issue on appeal. The Court of Appeals affirmed the trial court purely because of a failure of proof. In this connection it said:

> "The fact that on a vessel an accident occurred and a seaman was injured in the course of his duties does not, without more, prove that the vessel was unseaworthy. We conclude, as the Judge below concluded, that the libelant has produced no evi-

> ible evidence whatsoever to support his claim of unseaworthiness."

Thus, petitioner's libel was dismissed by the trial Court and the dismissal was affirmed by the Court of Appeals not because of a mis-application of negligence concepts or because of any unauthorized judicial legislation but solely for a failure of proof. Such characterizations as slippery shelf, "dangerous and precarious position", lack of a firm foot hold and hand hold, etc., find no support in the record but are purely a product of petitioner's imagination and are designed to create an apparent though fictitious basis for review by this Court.

POINT I

The opinion of the United States Court of Appeals is not in conflict with this Court's opinion in *Mitchell* v. *Trawler Racer, Inc.* or other decisions referred to in the petition. The Trial Court and the Court of Appeals correctly found that mere proof of injury coupled with a suggestion that a different procedure might have been followed without more does not spell out unseaworthiness.

In *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, this Court pointed out that though concepts of negligence were not to be the measure of liability under the concept of seaworthiness, the obligation to provide a seaworthy vessel did not cast the shipowner in liability merely because an accident occurred on his ship. Mr. Justice Stewart, in delivering the opinion in the *Mitchell* case, stated (362 U. S. 539 at p. 550):

> "What has been said is not to suggest that the owner is obligated to furnish an accident free ship.

> The duty is absolute, but is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. *Boudoin v. Lykes Bros. S.S. Co.*, 348 U. S. 336."

The Court of Appeals in affirming the judgment below followed this teaching of this Court when it said:

> "The fact that on a vessel an accident occurred and a seaman was injured in the course of his duties does not, without more, prove that the vessel was unseaworthy. We conclude, as the Judge below concluded, that the libelant has produced no credible evidence whatsoever to support his claim of unseaworthiness."

Clearly, therefore, both the Trial Court and the Court of Appeals followed the decision of this Court in the *Mitchell* case.

Thus, petitioner's argument that the Court of Appeals incorrectly interpreted the concept of seaworthiness and that it engaged in unauthorized judicial legislation is, therefore, obviously illusory. The plain fact is, as is indicated by the language of the Court of Appeals, that petitioner failed to establish that the vessel was in any way unseaworthy and that it was because of this failure on the part of the petitioner to carry his burden of proof that he was denied recovery.

POINT II

In view of the evidence and findings below there is no basis for review by this Court.

Even assuming that there was a basis in the record for petitioner's version of the facts this Court cannot accept them as a basis for granting certiorari in preference to the findings of the Court below. In the first place petitioner has conceded their validity by not challenging them in the Court of Appeals. Secondly, however, since the Trial Court's findings are supported by the evidence and are not clearly erroneous they can neither be disregarded nor set aside. *McAllister v. United States*, 348 U. S. 19. Any question as to whether the decision below merits review must be determined on such facts and not those which either do not exist or have not been established.

The decision below is, therefore, clearly not in conflict with decisions of this Court and creates no intra or inter circuit conflict. Furthermore, petitioner's failure to sustain his burden of proof creates no issue of importance which warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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